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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-564

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ZACHARY D. FASMAN
Attorney for
Edison Electric Institute

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 350 N
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-1300

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Edison Electric Institute respectfully supports the request of Petitioner Indiana & Michigan Electric Company that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The parties to this lawsuit have consented to the filing of this amicus brief, as evidenced by letters from the parties filed with this brief.

QUESTION PRESENTED [1]

Whether the National Labor Relations Board can, in the absence of proof of anti-union or discriminatory motivation, force an employer to concede to a union

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[1] The Edison Electric Institute concurs in the Opinions Below, Jurisdiction, Statutory Provisions Involved and Statement of the Case sections of the Petition for a Writ of Certiorari filed by Indiana & Michigan Electric Company in this case.

demand to either bargain outside of working hours or to release employees in other bargaining units from work in order to attend negotiations.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IMPROPERLY RESOLVES CRITICALLY IMPORTANT AND RECURRING QUESTIONS CONCERNING COLLECTIVE BARGAINING IN CONFLICT WITH PRINCIPLES OF FEDERAL LABOR POLICY ESTABLISHED BY CONGRESS AND BY THIS COURT.

In this case, the National Labor Relations Board has, for the first time, established a *per se* rule requiring employers either to negotiate outside of working hours or to release employees in other bargaining units from work in order to attend negotiations that do not directly affect their wages, hours or working conditions. This novel obligation, enforced by the Seventh Circuit, has been imposed in a case where there is no proof of anti-union animus or discriminatory motivation, but rather where the employer had legitimate business reasons for its refusal to accede to the union's proposal on the conduct of negotiations. The result of this holding is thus to require all employers in this country to concede important issues involving the operation of their businesses as well as the conduct of negotiations, issues that the National Labor Relations Board and the courts have previously ruled need not be conceded at the bargaining table.

Requiring concessions on such critical issues is plainly contrary to congressional intent expressed in Section 8(d) of the Act and flies in the face of repeated admonitions of this Court. Section 8(d) of the National Labor Relations Act specifically states that the "obligation [to bargain] does not compel either party to agree to a proposal

or require the making of a concession." 29 U.S.C. § 158(d) (1970). Time and again, this Court has interpreted Section 8(d) to mean precisely what it says: that the National Labor Relations Board may not compel agreement on substantive terms between parties to collective bargaining negotiations. Thus, in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), this Court held that an employer's steadfast refusal to agree to a union dues check-off provision was not in and of itself a violation of Section 8(a)(5) of the Act, stating:

> It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

397 U.S. at 108 (footnotes omitted). To the same effect, this Court held in *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), that an employer's refusal to make concessions regarding a management rights proposal was not a violation of Section 8(a)(5).

The meaning of Section 8(d), and the lesson of *H.K. Porter* and *American National Insurance*, is clear: the National Labor Relations Board may not, in the guise of defining the duty to bargain, compel concessions on substantive contract provisions. Yet the Board in this case has ignored these rulings and has directly ordered the

Petitioner, and indirectly ordered all of American industry, to concede vitally important questions to unions or be guilty of a refusal to bargain. As stated by Judge Wood, in dissent below:

> There was no collective bargaining agreement negotiated between the union and the company permitting employees to take time off to bargain outside their units at other locations. With this case as precedent there will no longer be any need for a union to bargain on that issue. The company has lost any right to bargain for some reasonable control or limitation on the practice. The union has gained a new bargaining tactic subject to obvious abuse. No limitation is placed on the number of employees nor the amount of time off that the union can now impose on an employer against its business judgment.

599 F.2d at 192. Under this decision, an employer has two unpalatable options: allow an unlimited number of nonunit employees an unlimited amount of release time, with disastrous impact upon efficiency, or bargain outside of working hours, with potentially disastrous impact upon the bargaining process. There is absolutely no warrant for imposition of this choice under the Act.

The decision below not only conflicts with decisions construing Section 8(d), but also with NLRB and circuit court decisions holding that concessions may not be compelled on the very issues involved in this case. The NLRB has previously held that the duty to bargain in good faith does not require either party to agree to bargain outside of working hours.[2] Nor does the Act require an employer to release employees from their work in order to attend negotiations concerning their own wages, hours and working conditions.[3] In the instant case, the

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[2] *Tennessee Chair Co.*, 126 N.L.R.B. 1357 (1960).

[3] *Borg Warner Controls*, 198 N.L.R.B. 726 (1972).

Board implicitly recognizes the continuing vitality of these doctrines,[4] yet concludes that refusal to concede on these two issues amounts to an unfair labor practice. The Board's ability to synthesize illegality from admittedly legal conduct cannot be condoned.[5]

The Board's basic error here lies in its hyperextension of the doctrine, enunciated in *General Electric Co.* v. *NLRB*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970), that either party has the right to freely choose its bargaining representatives. This case in no way turns on this principle, for as Judge Wood notes in dissent, 599 F.2d at 192, the Board has never required either party to sacrifice its vital interests in order to accommodate the other party's choice of representative. Indeed, the Board has frequently held that the unavailability of one side's representative does not excuse a refusal to meet,[6] thus implying that the freedom to choose a bargaining representative subsumes the choice of an individual in a position to attend bargaining sessions. Where, as here, the union representative is unable to meet because the employer must continue to operate its

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[4] 229 N.L.R.B. at 576.

[5] Similarly, the Fifth Circuit ruled in *Axelson Industries Inc.* v. *NLRB*, 101 L.R.R.M. 3007 (5th Cir. 1979), *enforcing* 234 N.L.R.B. No. 49 (1978), that payment of employees for time spent in negotiations is a mandatory subject of bargaining upon which neither party must concede. The issue of release time, or the timing of negotiations, is no less critical or mandatory.

[6] *Pepper & Tanner, Inc.*, 197 N.L.R.B. 109, 121-22 (1972), *enforced*, 474 F.2d 1256 (6th Cir. 1973); *Franklin Equipment Co., Inc.*, 194 N.L.R.B. 643, 645-46 (1972); *Insulating Fabricators, Inc., Southern Division*, 144 N.L.R.B. 1325, 1326-29 (1963), *enforced*, 338 F.2d 1002 (4th Cir. 1964); *Radiator Specialty Co.*, 143 N.L.R.B. 350, 369 (1963), *enforced*, 336 F.2d 495 (4th Cir. 1964); *Solo Cup Co.*, 142 N.L.R.B. 1290, 1295 (1963), *enforced*, 332 F.2d 447 (4th Cir. 1964); *"M" System Inc., Mobile Home Division Mid-States Corp.*, 129 N.L.R.B. 527, 549 (1960); and *Skyland Hosiery Mills, Inc.*, 108 N.L.R.B. 1600, 1605 (1954).

business, nothing in the Act requires the employer to sacrifice its interests in order to accommodate the union. As noted above, an employer may insist upon negotiating during working hours. Having done so, it should not be required to harm its business because the union has chosen a representative that is unable to meet. By failing to give any weight to Petitioner's legitimate interests in operating its business, the Board has in effect forced employers to become guarantors of the availability of union representatives. If the ruling below is allowed to stand, it will radically transform collective bargaining in this country in a fashion never intended by Congress, and specifically contrary to expressed congressional intentions and prior decisions of this Court.

CONCLUSION

For the reasons expressed above, the Edison Electric Institute respectfully prays, as an *amicus curiae*, that a Writ of Certiorari issue in this case.

Respectfully submitted,

ZACHARY D. FASMAN
Attorney for
Edison Electric Institute

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 350 N
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-1300